

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

SUNROC CORPORATION,
SUNROC MASONRY PRODUCTS DIVISION

Employer,

Case No. 27-RC-8377

and

OPERATING ENGINEERS LOCAL 3

Petitioner.

DECISION AND DIRECTION OF ELECTION

On March 10, 2005, Operating Engineers Local 3 ("the Petitioner"), filed a petition under Section 9(c) of the National Labor Relations Act ("the Act") seeking to represent "all production and maintenance employees" and excluding "all truck drivers, office clerical employees, salesmen, professional employees, guards and supervisors as defined in the Act." On March 22, 2005, a hearing was held before a hearing officer of the National Labor Relations Board ("the Board").

The parties agreed on the record that this case presents only one issue to be resolved: whether plant operators, sometimes referred to as machine operators, are supervisors within the meaning of Section 2(11) of the Act who must be excluded from the appropriate bargaining unit. The Employer contends that the four plant operators it employs are statutory supervisors, while the Petitioner maintains that they are

employees.¹ As discussed further below, I conclude that the plant operators are not supervisors within the meaning of the Act and that they must be included in the bargaining unit found appropriate.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the Employer is a Utah corporation with a facility located in St. George, Utah, where it is engaged in manufacturing masonry block products for sale to the construction industry. On an annual basis, the Employer purchases and receives goods valued in excess of \$50,000 directly from suppliers located outside the State of Utah.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following unit of employees:

¹ The record establishes that the Employer employs one individual classified as "plant operator trainee". The Employer does not contend that the plant operator trainee is a statutory supervisor.

INCLUDED: All full time and regular part time production and maintenance employees employed by the Employer in its Masonry Products Division in St. George, Utah.

EXCLUDED: All truck drivers, office clerical employees, salesmen, professional employees, guards, and supervisors as defined in the Act.²

STATEMENT OF THE CASE

The Employer operates two adjacent plants in St. George, Utah where it manufactures concrete block products. The raw materials used to manufacture the block products are initially loaded into a large, automated and computerized machine, called a “block machine”, and mixed. The machine pours the mixture into molds and later transports the “green” product to kilns where the product is cured. The finished product is then stacked on pallets for eventual transport to customers. At the two plants, the Employer employs approximately 22 hourly paid production and maintenance employees on a two-shift schedule operating from 4:30 a.m. until 1:00 p.m. and from 1:00 p.m. to 9:30 p.m., Monday through Friday. In addition, a maintenance shift works from 7:00 p.m. to 3:00 a.m. on those same days. Job classifications used in the Employer’s two plant operation include forklift operator, loader operator, labor, maintenance labor³, operator trainee and plant operator. During

² The parties stipulated that vice president Russell Leslie, plant manager Gerald Schupbach, and maintenance supervisor Glen Newhart are statutory supervisors. Because the record reflects that these individuals possess and exercise the supervisory indicia set forth in Section 2(11) of the Act, including the authority to hire and discharge employees, they are excluded from the appropriate unit. The parties also stipulated that sales managers Troy Bradshaw and Dan Clark are statutory supervisors. These individuals also are excluded from the appropriate bargaining unit.

³ The record establishes that typically on one occasion per month the Employer uses temporary employees that it assigns to the labor and maintenance labor job classifications. Both parties agree that these temporary employees should be excluded from the unit sought. These temporary employees are

each of the operating shifts at the two plants, there are normally approximately five employees working, including a plant operator, a forklift operator,⁴ a loader operator, and two laborers. One of these laborers checks finished product for quality purposes and the second laborer, sometimes referred to as a “cuber”, essentially arranges product on pallets. Unless the plant operator is present and operating the block machine, the other production employees are unable to work. If a plant operator is on vacation or otherwise unable to work as scheduled, another plant operator takes his place, usually by working a second shift, or plant manager Gary Schupbach operates the machine during the plant operator’s absence.

The maintenance shift is comprised of approximately seven maintenance and maintenance labor employees who work under the supervision of maintenance supervisor Glen Newhart.

All production and maintenance employees are hourly paid with pay ranging from \$9.50 per hour for some employees classified as labor to \$18.00 per hour for the highest paid plant operator. Hours of work for these employees, including plant operators, are recorded via the employees’ use of a “credit card” type of time card. All employees enjoy the same fringe benefits, including health benefits, pension plan, sick leave, and vacation benefits. A bonus plan based upon met production goals is available to all production and maintenance employees.

obtained from a temporary employee provider for no longer than a three or four day period depending on production demand. Because these temporary employees are employed for a set duration, appear to have no substantial expectation of continued employment, and the record contains no evidence of recall, I concur with the parties’ agreement that they be excluded from the unit found appropriate. See, **Owens-Fiberglas Corp.**, 140 NLRB 1323 (1963), and cases cited.

⁴ The fork lift operator performs his work for both plants during his shift.

Vice-president Russell Leslie is responsible for the overall operation of the masonry products division. His office is located at the Employer's ready-mix plant and shop approximately three-fourths of a mile from the two plants. Plant manager Gerard Schupbach reports directly to Leslie. Schupbach, who is responsible for the overall operation of the two plants, normally works from about 7:30 a.m. to 4:00 p.m. Schupbach hires all employees and obtains temporary employees when he deems it necessary. Schupbach hires plant operators based, at least in part, on previous experience in operating industrial machinery. Schupbach is responsible for all of the paperwork involved in operating the plants, including creating weekly production work schedules for both plants based. Schupbach reviews and approves work hours submitted by the plant employees, including plant operators. Schupbach also evaluates the work performance of the production employees, including plant operators, and is the person who terminates their employment when he deems it necessary.⁵ Schupbach is responsible for and conducts safety training for production and maintenance employees.

ANALYSIS AND FINDINGS

Section 2(3) of the Act excludes "any individual employed as a supervisor" from the Act's definition of "employee," thereby excluding supervisors from the Act's protections. Section 2(11) of the Act defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

⁵ Maintenance Supervisor Newhart is responsible for these duties with respect to maintenance employees.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. See **KGW-TV**, 329 NLRB 378, (1999); **Providence Hospital**, 320 NLRB 717 (1996). The requirement of use of independent judgment, however, is conjunctive. Thus, an individual is not a supervisor unless the individual exercises an authority with the use of independent judgment and holds the authority in the interest of the employer. **KGW-TV**, Id. Thus, an individual possessing Section 2(11) supervisory indicia must exercise authority in a manner that is not merely routine or clerical in nature. Only individuals with genuine management prerogatives are to be considered supervisors, as opposed to lead men and other minor supervisory employees. **Panaro & Grimes, d/b/a Azusa Ranch Market**, 321 NLRB 811 (1996). As stated by the Board recently in **Wal-Mart, Stores, Inc.**, 340 NLRB No. 31 (2003), “Because the Act excludes any “supervisor” of the employer from that definition of “employee” entitled to the Act’s protections, the Board has a duty not to construe supervisory status too broadly.” Finally, in the matter now under consideration, the burden is on the Employer, as the party alleging supervisory status, to prove that plant operators employed by the Employer are statutory supervisors. **NLRB v. Kentucky River Community Care**, 532 U.S. 706 (2001).

Based on the above-cited authority, the entire record herein, and for the reasons detailed below, I find that the Employer has not met its burden of establishing that plant operators are statutory supervisors, and I shall include them in the unit found appropriate for bargaining.

The Employer cites two bases for its assertion that plant operators are statutory supervisors. Specifically, the Employer maintains that plant operators (1) effectively

evaluate employees and (2) make effective recommendations that temporary employees be retained to become regular employees and that probationary employees be retained and converted to regular employee status subsequent to a 90-day probationary period.

As to the first issue, there is no record evidence to show that plant operators evaluate employees in any manner. Rather, as indicated above, the record establishes that it is plant manager Schupbach who evaluates the work performance of production employees, including plant operators.

As to the second issue concerning alleged recommendations that temporary employees be retained as regular employees and that that probationary employees be converted to permanent positions after a 90-day probationary period, plant manager Schupbach generally testified, “[T]hat decision is made by them and communicated to me. I follow that recommendation every time.” However, that general testimony was effectively rebutted by the testimony of the four plant operators.

Specifically, plant operator Michael Hansen testified that Schupbach only on occasion asks Hansen generally how an individual working on his shift “is doing”. According to Hansen, on such occasions, he responds that the individual is, “not doing very well” or that he is “doing very well.” Hansen testified, however, that he is not consulted with respect to whether Schupbach should retain or terminate the employee. Plant operator Chad Pettigrew testified that he had once been asked about temporary employees and whether he thought a particular temporary employee working as a “cuber” should be hired as a forklift operator. Because Pettigrew had previously seen the individual operate a forklift, he told Schupbach he thought the individual would be

“fine.” Plant operator Jared Geeting testified that he once asked Schupbach to consider his (Geeting’s) brother for employment as a plant operator. Plant manager Schupbach responded that Geeting’s brother should fill out an employment application and the matter of employment for Geeting’s brother went no further. Geeting testified that on another occasion, he asked Schupbach if a particular employee could remain employed because, in Geeting’s opinion, he was trained. According to Geeting, Schupbach expressed disagreement with keeping the employee recommended by Geeting, and Schupbach indicated that another individual would be retained instead. Plant operator David Mortensen testified that on occasion Schupbach asks him which temporary employees “seem to be doing better.” Mortensen testified that in these instances, it “seemed” that Schupbach chose to retain the temporary employee or employees named favorably by Mortensen. Mortensen specifically testified that on occasion Schupbach has asked him if an employee, “is doing okay”, but that he is not asked for specific recommendation concerning continued employment of that employee.

The foregoing unrebutted employee testimony demonstrates that, while plant manager Schupbach may on occasion seek an opinion or consider a suggestion from plant operators before he decides the issue of employment or continued employment for employees, it is Schupbach who make these decisions. The opinion or suggestion rendered by a plant operator as to the ability or quality of a fellow shift employee’s work performance, without more, falls far short of the evidence necessary for a showing that the Employer’s plant operators are statutory supervisors because they effectively recommend the hiring or continued employment of employees. See, e.g., **Brown & Root, Inc.** 314 NLRB 19, 21 (1994). The fact that the Employer may have ultimately

followed recommendations made by plant operators also does not render them supervisors. See generally, **PHT, Inc.**, 297 NLRB 228, 234 (1989). Where an employer merely relies on an employee's experience or skill in evaluating potential employees, but the employer makes the final hiring decision, the evaluating employee is not exercising the authority to hire contemplated by Section 2(11). **The Ohio River Company**, 303 NLRB 696 n. 1 (1991); **World Theatre Corp.**, 316 NLRB 969 (1995). Even repeated referrals or recommendations of prospective employees are not sufficient to confer supervisory status where the referring or recommending employee does not actually participate in the hiring decision. **Esco Corp.**, 298 NLRB 837, 839 (1990); **Browne of Houston, Inc.**, 280 NLRB 1222, 1224 (1986). In the circumstances of this case, the recommendations made by plant operators regarding the retention or hiring of employees does not confer supervisory status upon them. **First Western Building Services**, 309 NLRB 591, 600 (1992). Accordingly, I find that the Employer has failed to meet its burden of establishing that plant operators are statutory supervisors who must be excluded from the appropriate bargaining unit.

CONCLUSION

In accordance with the above discussion, I conclude that the plant operators are not statutory supervisors and that they must be included within the collective bargaining unit otherwise agreed to by the parties.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the Notice

of Election to issue subsequently, subject to the Board's Rules and Regulations.⁶

Eligible to vote are those in the unit as described above who are employed by the Employer during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have maintained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

OPERATING ENGINEERS, LOCAL 3

⁶ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. **Excelsior Underwear Inc.**, 156 NLRB 1236 (1966); **NLRB v. Wyman-Gordon Co.**, 394 U.S. 759 (1969); **North Macon Health Care Facility**, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days from the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Regional Director of the Board's Region 12, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office of Region 27, National Labor Relations Board, Suite 700-North, 600-17th Street, Denver, Colorado 80203-5433 on or before **April 15, 2005**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **April 22, 2005**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional

Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 8th day of April 2005.

_____/s/ Wayne L. Benson_____
Wayne L. Benson, Acting Regional Director
National Labor Relations Board
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